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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 535

UNITED RAILROAD WORKERS DIVISION OF TRANSPORT WORKERS UNION OF AMERICA, in its own right and as representative of the UNITED RAILROAD WORKERS OF AMERICA, CIO, LOCAL 1463, and its members, *et al.*,

Petitioners,

against

THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX TO PETITION

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	4
Statement of Case and Disposition Below	4
Reasons For Granting the Writ	9
Conclusion	15
Appendix A—Statutes	16
Appendix B—Opinion Below	19
Appendix C—Decision Below Denying Petition for Rehearing	34
Appendix D—Judgment Below	36
Proof of Service	38

CITATIONS

Cases:

	PAGE
Brotherhood of Locomotive Engineers, et al. v. Missouri-Kansas-Texas Railroad Company, et al., October Term, 1959, No. 165	2, 3, 9, 10
Brotherhood of Railroad Trainmen v. Chicago River & Ind. R.R. Co., 353 U. S. 30, 41-42 (1957)	3, 12, 14
Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. Co., 321 U. S. 50 (1944)	13, 14
Butte, Anaconda, Pacific Railway Co. v. Brotherhood of L. F. & E., 268 F. 2d 54 (9th Cir. 1959)	13
Missouri-Kansas-Texas Railroad Co. v. Brotherhood of Locomotive Engineers, 266 F. 2d 335 (5th Cir. 1959)	10, 12
Order of Railway Conductors of America v. Pitney, 326 U. S. 561 (1946)	12
Railroad Yardmasters of America v. Pennsylvania Railroad Co., 224 F. 2d 226 (3rd Cir. 1955)	12
Virginian Railroad Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 300 U. S. 515 (1937)	12

Statutes:

Norris-LaGuardia Act, 47 Stat. 72 (1932), Section 8 (29 U.S.C. §108)	13, 16
Railway Labor Act, 48 Stat. 1185 (1934) and 64 Stat. 1238 (1951):	
Sec. 1a (1), (4), and (5) (45 U.S.C. §151a (1), (4) and (5))	11, 14, 16
Sec. 2 (First), (Second), and (Seventh) (45 U.S.C. §152 (First), (Second), and (Seventh))	11, 14, 16, 17
Sec. 3 (First-(i)) (45 U.S.C. §153 (First-(i))	11, 17
Sec. 6 (45 U.S.C. §156)	11, 14, 17, 18

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The United Railroad Workers Division of the Transport Workers Union of America and certain officers thereof named in the complaint in this action, the United Railroad Workers of America, Local 1463 and certain officers thereof named in the complaint in this action, the Railroad Marine Union and certain officers thereof named in the complaint in this action, and Bernard Kearns, John J. Murray and James P. Ambrose individually and as officers of Local M-108 United Marine Workers, Division of District 50, United Mine Workers of America (hereinafter

referred to as "petitioners") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit filed in the above-entitled case on October 2, 1959.

Petitioners further pray that should a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case, this Court review said judgment concurrently with its review of the judgment of the United States Court of Appeals for the Fifth Circuit in the case of *The Brotherhood of Locomotive Engineers, et al.* v. *Missouri-Kansas-Texas Railroad Company et al.*, October Term, 1959, No. 165, in which certiorari was granted by this Court on October 12, 1959, as the question therein accepted by this Court for review is almost identical to the first of two questions presented by this petition.

Opinions Below

The opinion of the District Court is printed at pages 142a-162a of the Joint Appendix below and is reported in 176 F. Supp. 53. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, pages 19-33, is not as yet reported. The decision of the Court of Appeals denying the Petition for Rehearing, printed in Appendix C hereto, *infra*, pages 34-35, is not as yet reported.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on October 2, 1959. Appendix D, *infra*, pages 36-37. Rehearing was denied on November 12, 1959. Appendix C, *infra*, pages 34-35.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Whether a District Court under circumstances where a dispute arising under the Railway Labor Act has been submitted by railroads to the National Railroad Adjustment Board and the New York Harbor Marine Board of Adjustment and an injunction against a strike by employees is sought on authority of *Brotherhood of Railroad Trainmen* v. *Chicago River and Ind. R.R. Co.*, 353 U. S. 30, may on the granting of an injunction impose reasonable conditions designed to protect the employees against a harmful change in working conditions during pendency of the dispute before the Adjustment Board by ordering that the railroads restore the status quo, or, in the alternative, pay the employees the amount they would have been paid had changes in working conditions giving rise to the dispute not been made?

(With the exception of reference to railroads in the plural sense and addition of the phrase "and the New York Harbor Marine Board of Adjustment", this question is the same one as was accepted by this Court in *The Brotherhood of Locomotive Engineers, et al.* v. *Missouri-Kansas-Texas Railroad Company, et al.*, October Term, 1959, No. 165, now pending review.)

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2. Whether the Norris-LaGuardia Act prohibits the issuance of an injunction against a strike by railroad employees where railroad employers have summarily discharged a craft of employees and have made no attempt to comply with their duty under the Railway Labor Act nor made any reasonable effort to settle the labor dispute caused by their action when the District Court from which

the injunction is sought does not further grant a mandatory injunction to restore the discharged employees to their former positions pending the completion and exhaustion of the procedures and processes of the Railway Labor Act?

Statutes Involved

The statutory provisions involved are Sections 1a(1), 1a(4), 1a(5), 2 (First), 2 (Second), 2 (Seventh), 3 (First-(i)), and 6 of The Railway Labor Act, 48 Stat. 1185 (1934) and 64 Stat. 1238 (1951) 45 U.S.C. §§151a(1), (4) and (5), 152 (First), (Second), and (Seventh), 153 (First-(i)), and 156; and Section 8 of the Norris-LaGuardia Act, 47 Stat. 72 (1932), 29 U.S.C. §108. They are printed in Appendix A, *infra*, pages 16-18.

Statement of Case and Disposition Below

The ten railroad respondents herein, on the morning of June 10, 1959, without advance notice to either the petitioners or affected employees, posted notices abolishing the positions variously designated as "oiler," "firemen" or "oiler firemen" (hereinafter referred to as "oiler") on all of their diesel-powered tug boats, effective 12:01 A.M. June 15, 1959 (Plaintiffs' Exhibit B, 138a).[1] This unilateral action, taken simultaneously by the ten railroads, completely abolished the craft of oiler on seven of the ten railroads, which operate diesel tugs exclusively and abolished the craft of oiler on diesel tugs on the three railroads which still maintain both diesel and steam tugs.

The immediate result was the abolition of at least 125 regular oiler positions and the summary firing of at least 125 regularly assigned employees, together with a sub-

[1] Page references are to the Joint Appendix below, which contains all Exhibits except Plaintiffs' Exhibits A-1 through A-6 and D, which are filed separately.

stantial number of extra oilers, i.e., men not regularly assigned (81a, 145a).

The controversy thus precipitated has widespread effect, for, as was recognized in the dissent below, it is a phase of a nationwide dispute which may reach crisis proportions within a few months (ft. note 1, pages 28-29, *infra*).

The action by the railroads, obviously executed after substantial preparation and deliberation among themselves, was taken without any prior notice to or negotiation with the employees or the unions concerned. The railroads made no attempt whatsoever to negotiate with the unions or even to discuss the planned abolition prior to their action of June 10, 1959 (68a; 150a).

The District Court below found that this action of the railroads was the cause of the labor dispute in question (144a, 156a).

On the morning of June 15, 1959, the abolition of the positions became effective. At that time, fellow employees refused to pass picket lines set up by the fired oilers acting completely independently of their respective unions (48a; 69a; 80a). A work stoppage on all railroad tugboats occurred (145a) and marine operations of the railroad respondents in New York Harbor came to a halt until restoration of the abolished positions on June 20, 1959, pursuant to the order of the United States District Court for the Southern District of New York, Bryan, D.J. (163a).

The firing of the oilers and the resulting disruption of marine service caused serious hardship to the public, loss of revenue to the railroads (147a), and great injury to the fired oilers and their unions (41a; 49a; 51a). The marine operations of respondents are an important link in their transportation service by way of interchange and otherwise. The facilities handle approximately 49 million tons

of freight per year, and the float service operated by the tugs in question handles an average of 1,547 cars of freight daily (147a).

The respondents operate approximately 60 tugs in their marine operations. Approximately 44 of these tugs are diesel-powered, and approximately 15 are steam-powered (54a). Seven of the ten railroads operated only diesel tugs on June 10, 1959, and also when each of them entered into currently effective bargaining agreements covering the oiler craft.

There has been no change in the extent of the dieselization of tugs and no technological development in diesel operation on any of the railroads since current collective bargaining agreements became effective (93a). There are six collective bargaining agreements in question which have effective dates of November 18, 1955, December 1, 1955, January 1, 1956, January 11, 1957 and January 19, 1959 (Plaintiffs' Exhibits A-1—A-6).

The duties of the oiler on the diesel tugs are extensive and responsible and include fueling the tug, wiping and greasing the engines and other machinery, cleaning and inspection duties, acting as a safety guard, and assisting and relieving the engineer. As a result of the abolition of the oiler position a single engineer became the only person assigned to duties in the engine room of the diesel tug boats, and the oiler duties were necessarily transferred to the engineer. This transfer constituted a substantial change in the engineer's job (46a-47a).

In the labor agreements covering the oiler craft on all of the respondent railroads, except the Pennsylvania Railroad, there is the following provision.

> "Established positions shall not be discontinued or abolished and new ones created under different titles covering relatively the same classes of work

for the purpose of reducing rates of pay and evading the applications of the articles of this Agreement." (Plaintiffs' Exhibit A-2, Article 15, page 18)

When the union petitioners were informed by their members that the notice of June 10, 1959 had been posted they notified the respondent railroads by telegram that they considered this summary action a violation of existing collective bargaining agreements and that a strike of tug boat personnel had been authorized for June 15, 1959, at 12:01 A.M. when the respondents' abolition of established oiler positions was to become effective (Plaintiffs' Exhibits E and F, 140a, 141a).

The railroads, after substantial preparation prior to June 10, 1959, commenced the present action and obtained a temporary restraining order from the United States District Court for the Southern District of New York, Murphy, D.J., on June 11, 1959. On the same date they filed lengthy and detailed mimeographed *ex parte* submissions to Adjustment Boards established under the Railway Labor Act, which submissions sought a ruling from the Boards that the abolition of the positions in this manner was proper. On June 15, 1959 petitioners filed a cross-motion for an order directing the railroads to restore the oilers to their former positions pending the determination of the dispute under procedures authorized by the Railway Labor Act.

The refusal of the railroads to negotiate in good faith or to discuss the dispute with the unions is illustrated by the tactics which the respondents employed in filing of *ex parte* submissions with the Adjustment Boards and in seeking equitable relief from the District Court.

On June 11, 1959, prior to receipt of notice from two of the union respondents herein of an intention to strike, all respondents made *ex parte* submissions of the dispute to

Adjustment Boards (Plaintiffs' Exhibits D, E and F, 140a, 141a). The unions herein were not informed of such submissions until the hearing of June 16, 1959 on the two motions, and they were given copies of such submissions only by direction of the District Court (101a, 102a), despite allegations in the submissions of certain respondents that "all data contained herein have been presented to the representatives of the organization involved herein" (Plaintiffs' Exhibit D). Indeed, one of the respondents in fact made application for the restraining order of June 11, 1959, prior to notice from the union representing its employees of an intention to strike (30a-32a; 140a).

When the District Court below issued the temporary restraining order each of the unions herein immediately cancelled its strike authorization and instructed its members not to strike (48a; 69a; 70a; 95a). This action, however, did not affect the right of the fired oilers, who were no longer members of the collective bargaining unit, to demonstrate against their summary firing. None of their former fellow employees would cross hastily erected picket lines set up by these men, with the result that all freight haulage in New York Harbor ceased (62a; 69a; 70a).

The situation was remedied by the order of the District Court on June 20, 1959 (163a-165a), which granted both the respondents' motion for a preliminary injunction against a strike or work stoppage and petitioners' cross-motion for a mandatory injunction restoring the discharged employees to their former positions. The Court ordered that both injunctions remain in effect until the procedures and processes of the Railway Labor Act for the settlement of the dispute had been completed and exhausted. The effect of the order was to restore the situation to the status quo as of immediately prior to

June 10, 1959, the date of respondents' precipitate action (156a).

Respondents appealed to the Court of Appeals from that portion of the order which granted the mandatory injunction, and petitioners cross-appealed from that portion of the order which granted the preliminary injunction. The Court of Appeals (Clark, Chief Judge, and Swan and Moore, Circuit Judges) reversed the mandatory injunction and affirmed the preliminary injunction in an opinion from which Chief Judge Clark dissented (Appendix B, *infra*, pages 19-33). On October 16, 1959, petitioners herein filed a Petition for Rehearing in the Court of Appeals. This petition was denied on November 12, 1959 by the same court with Chief Judge Clark again dissenting (Appendix C, *infra*, pages 34-35).

The basis for the jurisdiction of the United States District Court for the Southern District of New York was alleged by respondents to be the Railway Labor Act (45 U.S.C. Section 151-188), 28 U.S.C. Sections 1331-1337, and the Interstate Commerce Act, 49 U.S.C. Sections 1 *et seq.* (5a).

Reasons for Granting the Writ

1. The decision of the Court below in the instant case, like that of the Court of Appeals for the Fifth Circuit in *The Brotherhood of Locomotive Engineers, et al.* v. *Missouri-Kansas-Texas Railroad Company, et al.* (October Term, 1959, No. 165, certiorari granted October 12, 1959) now before this Court for review, has decided an important question of federal law which has not been, but should be settled by this Court.

The Court below held that the Railway Labor Act denies jurisdiction to a District Court to grant a mandatory in-

junction to require employers to maintain the *status quo ante* pending the completion and exhaustion of the procedures and processes of the Railway Labor Act as a reasonable condition to the grant of an injunction against a strike by employees when the employers have referred this dispute to Adjustment Boards established under the provisions of the Railway Labor Act.

This issue is now before this Court in the *Missouri-Kansas-Texas Railroad* case, and the question therein accepted for review by this Court is appropriately stated herein in virtually identical language as the first question presented.

Not only does there exist an identity of issue between the two cases, but the Court below in fact relied on *Missouri-Kansas-Texas Railroad Co.* v. *Brotherhood of Locomotive Engineers*, 266 F. 2d 335 (5th Cir. 1959) as controlling precedent in reaching its conclusion that the grant of a mandatory injunction must be reversed.

The question presented here is basic to a determination of the intent and purpose of the Railway Labor Act. The decision of the Court of Appeals permits the frustration of the clear purpose of the Railway Labor Act and provides a means for carriers to nullify and emasculate important provisions of the Act.

This danger was ably described in the petition for a writ of certiorari filed with this Court in *The Brotherhood of Locomotive Engineers et al.* v. *Missouri-Kansas-Texas Railway Company et al.* The petition, speaking of a similar decision of the Court of Appeals for the Fifth Circuit, characterized the danger as follows:

> "Under the holding of the Court of Appeals a carrier desiring to effect changes in working conditions embodied in collective bargaining agreements, and at the same time to avoid the procedures

> of notice, negotiation, mediation, and agreement prescribed in the agreements or in the Railway Labor Act, need only unilaterally order the changes to be made, decline to maintain the status quo, obtain an injunction against the strike provoked by its action, refer the matter to the Adjustment Board, ride out the years of decision in that Board in enjoyment of the changes unilaterally, and if it is wrong, unlawfully made by it, secure in the knowledge that the court from which it obtained the writ of injunction is powerless to require restoration and maintenance of the status quo as a condition of the grant of the writ."

Such result does violence to the clear intention of the Railway Labor Act set forth in Sections 151a (1), (4) and (5) as a statement of general purposes and in Sections 152 (First) and 152 (Second) as a statement of duties of carriers and employees under the Act. The decision further gives a cloak of immunity to a carrier which violates the mandate of Section 152 (Seventh) of the Act. It provides a means of by-passing and avoiding the requirements of Section 156 of the Act by unilateral action to characterize the dispute as one governed by Section 153 of the Act until such time as an Adjustment Board has ruled otherwise. The indiscriminate use of claims of managerial prerogative and assertions that a dispute is not governed by Section 156 has now become a weapon capable of destroying the intention and purpose of the Railway Labor Act.

The Court below in fact decided a federal question in a way in conflict with applicable decisions of this Court. This question concerns the powers of a District Court to exercise its equitable powers in a railway labor dispute of this nature.

There is clear authority that federal district courts are broadly empowered to issue injunctions and other appro-

priate orders to carry out the policies and purposes of the Railway Labor Act. *Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R.R. Co.*, 353 U. S. 30, 41 42 (1957); *Virginian Railroad Co.* v. *System Federation No. 40, Railway Employees Department of American Federation of Labor*, 300 U. S. 515 (1937); *Railroad Yardmasters of America* v. *Pennsylvania Railroad Co.*, 224 F. 2d 226 (3rd Cir. 1955). As stated in the dissent of Chief Judge Clark below, there is nothing in the Railway Labor Act or in the nature of Adjustment Board proceedings which demands that the powers of a District Court be radically limited or changed if a labor dispute contains an issue cognizable by an Adjustment Board.

The Court below found but limited precedent to support its holding that a District Court is not empowered to exercise its equitable powers to maintain the *status quo ante* in the dispute here. It could cite but one decision of this Court in support of its position: *Order of Railway Conductors of America* v. *Pitney*, 326 U. S. 561 (1946), which opinion is clearly distinguishable on the facts.

The only other authority cited by the Court below was the *Missouri-Kansas-Texas* case, with which petitioners herein seek a concurrent review by this Court and an earlier decision of the Court of Appeals for the Second Circuit which the Court asserted was of similar effect.

2. The decision of the Court below should be reviewed because it decides a second important federal question which has not been, but should be, settled by this Court. This question is one of great importance to the administration of the national labor laws. It held that under the circumstances of this case, the Norris-LaGuardia Act presents no prohibition of the grant of the preliminary injunction against a strike or work stoppage.

It is submitted that where respondent railroads summarily abolished the craft of oiler and discharged all

employees in such craft and made no effort whatsoever to comply with their duty under the Railway Labor Act to discuss and negotiate the labor dispute caused by their action, a preliminary injunction against a work stoppage by employees cannot be granted when not joined with such mandatory injunction as was granted by the District Court below.

Section 8 of the Norris-LaGuardia Act (29 U.S.C. §108) states in clear language that injunctive relief shall not be granted to any complainant "who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or has failed to make every reasonable effort to settle such dispute by negotiation or with the aid of any available governmental machinery • • •".

These provisions demand that any party to gain injunctive relief in a dispute of this nature must have in good faith made an attempt to use the processes and procedures provided by the Railway Labor Act, as this Court recognized in *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50 (1944).

The Court of Appeals for the Ninth Circuit has recently applied this doctrine in the case of *Butte, Anaconda, Pacific Railway Co.* v. *Brotherhood of L. F. & E.*, 268 F. 2d 54 (9th Cir. 1959), where it found a labor dispute governed by Section 156 of the Railway Labor Act and denied injunctive relief to a railroad petitioner which had not complied with provisions of the Railway Labor Act.

Petitioners herein have asserted throughout these proceedings that the dispute involved is one to which the provisions of Section 156 of the Railway Labor Act are applicable. It is submitted that the circumstances here clearly demonstrate that this dispute should be considered

a "major dispute" within the terms of Section 156 and thus one to which the *Toledo* case applies.

Indeed, Chief Judge Clark noted that the instant controversy is of major importance irrespective of which statutory procedure is presently applicable to it. (Ft. note 1, pages 28-29, *infra.*)

The Court below relied upon *Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R.R. Co., supra,* as authority for its assertion that the Norris-LaGuardia Act does not prohibit the issuance of a preliminary injunction in this case after it ruled that the dispute was a "minor dispute". Petitioners submit that the Court below was in error in finding that the dispute herein was such a "minor dispute" that the authority of the *Toledo* case is not applicable.

Whether it is determined that the respondents here violated the duties of Section 152 (Seventh) and 156 of the Railway Labor Act, it is clear that they refused to carry out duties required by Sections 151a and 152 of the Act. Such refusal in the circumstances of this case when joined with their failure to make every reasonable attempt to settle the dispute should result in the denial of the railroads' application for injunctive relief.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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APPENDIX A

Statutes Involved

1. Railway Labor Act, 1934, Section 1a (1), 1a (4), 1a (5), 2 (First), 2 (Second), 2 (Seventh), 3 (First-(i)), and 6; 45 U.S.C. §§ 151a (1), (4) and (5), 152 (First), (Second), and (Seventh), 153 (First-(i)), and 156; 48 Stat. 1185 (1934) and 64 Stat. 1238 (1951):

Sec. 151a *(General purposes):*

> The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; * * * (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

Sec. 152 *(General duties—Duty of carriers and employees to settle disputes):*

> First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.
>
> Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition,

in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * * * *

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Sec. 153 *(National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards):*

First. There is established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

Sec. 156 *(Procedure in changing rates of pay, rules, and working conditions):*

Appendix A

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

2. Norris-LaGuardia Act, 1932. Section 8; 29 U.S.C. § 108; 47 Stat. 72 (1932):

Sec. 108 *(Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief):*

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

APPENDIX B

Opinion Below.

UNITED STATES COURT OF APPEALS

For the Second Circuit.

No. 354—October Term, 1958.

(Argued August 21, 1959 Decided October 2, 1959.)

Docket No. 25757

The Baltimore & Ohio Railroad Company *et al.*,
Plaintiffs-Appellants,

v.

United Railroad Workers Division of Transport Workers Union of America *et al.*,
Defendants-Appellees.

Before:

Clark, *Chief Judge*,
and Swan and Moore, *Circuit Judges*.

Cross-appeals from an order of the United States District Court for the Southern District of New York entered June 20, 1959, Hon. Frederick van P. Bryan, *Judge*.

Appellants appeal from that part of the order which by mandatory injunction required them to restore and maintain the *status quo ante* until the provisions of the Railway Labor Act for settlement of the labor dispute that is the subject matter of the action shall have been complied with. The appellees have cross-appealed from that part of the order which granted a preliminary injunction, enjoining

them from any strike or work stoppage during the same period.

Mandatory injunction reversed on appellants' appeal; preliminary injunction affirmed on appellees' cross-appeal.

SWAN, *Circuit Judge*:

These are cross-appeals from an order entered June 20, 1959 pursuant to an oral opinion of Judge Bryan. Both parties agree that the dispute between them is one within the scope of the Railway Labor Act, 45 U. S. C. A. §151 *et seq.* and the court below so ruled. The case was heard upon affidavits and concessions in colloquy with the court. The facts as stated in Judge Bryan's opinion are substantially as follows:

The appellants are ten interstate railroad corporations each of which has a collective bargaining agreement with one of the appellee labor organizations (the other appellees being officers and members thereof). Each of the railroad carriers operates in the New York Harbor area one or more diesel powered tugs in the transportation of interstate commerce. The marine operations of appellants are an important factor in the financial success of their business and in the efficiency of the service rendered to the public. Any disruption of such operations would be disastrous not only to them but also to the metropolitan area they serve.

On June 10, 1959 each of the appellants posted a notice, effective at 12:01 a.m. June 15, abolishing the position of oiler on their diesel powered tugs. Previously the engine room of these tugs had been manned by an engineer and an oiler, the latter being sometimes called a fireman, as he is on steam operated tugs. Upon learning of the post-

ing of such notices, appellee United Railroad Workers Division of Transport Workers Union of America, hereafter called T. W. U., by telegram dated 11:55 a.m., June 10, 1959, notified the seven appellants with which T. W. U. had collective bargaining agreements that it considered their action a violation of the agreements and had authorized a strike effective at 12:01 a.m. June 15, 1959.[1] After receipt of the strike threat, these seven appellants on June 11, 1959 made an *ex parte* submission of the dispute created by the threatened strike to the New York Harbor Marine Board of Adjustment as provided for in the applicable collective bargaining agreements. The other three appellants, The Long Island Railroad Company, The Pennsylvania Railroad Company and the Bush Terminal Railroad Company, made a similar *ex parte* submission to the National Railroad Adjustment Board, Fourth Division, Chicago, Illinois, as the collective bargaining agreements applicable to these three appellants did not provide for a special adjustment board. After submission to the appropriate Boards, the appellants filed the present suit to enjoin the threatened strike. A temporary restraining order was issued by Judge Murphy on the afternoon of June 11, 1959, and the plaintiffs' motion for a preliminary injunction was ordered to be heard on June 16, 1959. On that date the plaintiffs' motion came on before Judge Bryan, together with defendants' cross-motion for a mandatory injunction to restore the oilers to their former positions. Despite the temporary restraining order, a serious work stoppage did occur. The oilers who had been laid off began picketing piers where tug boats were

1. Similar telegrams were subsequently received by the other appellants from the other appellee labor organizations.

tied up. Employees in other crafts refused to cross the picket lines and all railroad traffic by water in the Harbor area ceased to move. On June 19, 1959 Judge Bryan rendered an oral opinion and by order entered June 20, 1959, granted both plaintiff's motion and defendants' cross-motion, both injunctions to remain in effect until the procedures of the Railway Labor Act, 45 U. S. C. A. §151 *et seq.*, for settlement of the dispute had been exhausted. Plaintiffs have appealed from that part of the order which directed restoration of the abolished positions. Defendants have appealed from that part of the order which granted a preliminary injunction against a strike or work stoppage, but they explain that their appeal is merely to protect themselves in case the plaintiffs' appeal shall succeed. The order re-established the status which existed before the labor dispute arose and defendants are satisfied with that situation.

The Railway Labor Act as interpreted by numerous cases recognizes two types of disputes between employer and employees, "minor" and "major." The distinction between them is clearly set forth in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 722-724, and was approved recently in *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30, 33. As there stated, "The first step toward settlement of either kind of dispute is negotiation and conference between the parties." Minor disputes arise out of the interpretation or application of existing collective bargaining agreements and grievances arising therefrom, while a major dispute is one that arises from an intended change in agreements affecting rates of pay, rules or working conditions. The Act provides procedures for the settlement of either type in order to prevent the disruption of interstate commerce

during its pendency. In the case of a minor dispute the parties are to confer and, if the dispute cannot be settled by conference, either party may resort to the appropriate division of the National Railroad Adjustment Board. 45 U. S. C. A. §153(i). In a minor dispute the railway employer is under no duty to restore the *status quo ante* during its pendency. In the case of a major dispute there is such a duty, 45 U. S. C. A. §156, and if the dispute is not adjusted by conference either party may invoke the services of the Mediation Board, or the latter may proffer its services. 45 U. S. C. A. §155(b).[2]

The appellants have consistently taken the position that as employers they have the managerial right (privilege) which the common law accords to an employer to discontinue an economically unnecessary position, unless the privilege has been lost by statute or by collective bargaining agreements with the unions. They assert that the Act has not curtailed this managerial privilege; that whether it has been lost by their agreements involves an interpretation of those agreements, and consequently the dispute is a minor one within the meaning of the Act. The appellees, on the other hand, contend that the railroads' action in abolishing the position of oiler on diesel powered tugs without prior notice to or discussion with the unions was a violation both of the collective bargaining agreements and of §156 of the Act, and consequently the dispute is a major one. Appellees further argue that even if the dispute be considered minor, the railroads had a duty to

2. By telegram dated June 15, 1959, 6:41 p.m. the National Mediation Board requested appellants and appellees to meet with Mediator O'Connell on June 16 for "discussion and investigation" of issues involved in this dispute. But the National Mediation Board never assumed jurisdiction of the controversy. The discussions were suspended pending disposition of the motions before the district court.

negotiate under the Railway Labor Act before they unilaterally abolished the position of oiler. The latter argument assumes that the mere posting of the notices of abolution created a dispute. We think the assumption fallacious. No dispute existed until the unions voiced disapproval of the railroads' action. This they did by threatening to strike. They might, however, have acquiesced in the railroads' interpretation of the agreements and not sent a strike threat. Until management announced its decision, the unions had no grievance, and nowhere in the Act is to be found any intimation that management must consult with union representatives before taking such action. The appellees argue that if the railroads were permitted to treat every dispute of this nature as a question of interpretation of the pre-existing agreements, they could thus nullify and emasculate §156 of the Act by asserting that their action was an exercise of their prerogative of management. The argument is answered to our satisfaction by the analysis of Judge Haynesworth in *Norfolk & P. B. L. R. Co.* v. *Brotherhood of Railroad Trainmen*, 4 Cir., 248 F. 2d 34, cert. den. 355 U. S. 914, derived from the Cox and Dunlop article in 63 Harvard Law Review 389, 401, which explicitly delineates at pages 41-42 the different purposes underlying §153 and §156.

> "All of such decisions [in the minor dispute category] when effectuated have a resultant effect upon working conditions and are of interest to employees and their representatives. They are none the less regarded as being within the prerogative of management alone to decide and effectuate in the first instance • • • If a matter falls within the second class of decision [major dispute], under the Railway Labor Act and under the applicable agreements, the

> carrier can make no change without initiating negotiation by giving the notice required under Section 6 of the Act and participating in the subsequent procedures available in aid of settlement of a 'major dispute.' • • •"

Primary jurisdiction to determine whether a dispute is minor or major resides in the agencies established by the Railway Labor Act. As to this the parties are not in disagreement. Appellants acknowledge it implicitly in their *ex parte* submissions to the Adjustment Boards. Appellees expressly acknowledge it in their Brief by the statement: "The role of the Court is to protect the jurisdiction of the Railway Labor Act agencies which are the appropriate bodies to decide the issues herein and to vindicate the policies and procedures of the Railway Labor Act to permit them to be carried out effectively." This view is correct as plainly indicated by *Order of Conductors* v. *Pitney*, 326 U. S. 561, where Mr. Justice Black, speaking for the Court said at page 567: "• • • The factual question is intricate and technical. An agency specially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then. • • • Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute. • • •"[3]

3. This language must be understood as applicable only to an injunction intended to maintain the *status quo ante*. It does not apply to an injunction restraining a threatened strike or work stoppage, the prevention of which is necessary "To avoid any interruption to commerce or to the operation of any carrier engaged therein; • • •" See 45 U. S. C. A. §151a which sets forth the general purposes of the Act.

Appendix B.

The Adjustment Board may decide (1) that the dispute is minor and that the Railroads' interpretation of the collective bargaining agreements is correct; or (2) that the dispute is minor but the Railroads' interpretation of the agreements is incorrect; or (3) that the dispute is major and the Adjustment Board has no jurisdiction. If the Adjustment Board decides that the Railroads' interpretation is correct, it is obvious that the district court has done an injustice to appellants by the mandatory restoration of the oilers to their former positions, for the railroads can never recover the wages they have been forced to pay. If the Adjustment Board decides that the railroads' interpretation is erroneous, the oilers will suffer no injustice for the Board can order restoration and back pay. If the Adjustment Board finds that it lacks jurisdiction because the dispute is major, then resort must be had to the National Mediation Board.

Judge Bryan did not decide whether the dispute was minor or major. We think he should have done so. It is clear that the respective contentions of the railroads and the unions are based on existing agreements. Their claims are to rights accrued, not to the creation of new rights for the future. Hence the dispute is a minor one, the resolution of which is committed to the Adjustment Board. Granting a mandatory injunction to restore the oilers to their former positions before the Adjustment Board has had an opportunity to act was erroneous. *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Loc. Eng.*, 5 Cir., 266 F. 2d 335, seems to be precisely in point. There it was held that since the jurisdiction to pass judgment on the merits of the dispute had been committed to the Adjustment Board, the district court could not, under the guise

of exercising its discretionary equity power, require the maintenance of the *status quo ante*. To do so is to decide the merits of the dispute before the Adjustment Board has acted. To similar effect is the decision of this court in *Stichman* v. *General Grievance Committee*, 2 Cir., 267 F. 2d 941, affirming on opinion below Judge Dawson's decision in 172 F. Supp. 329.

The unions further contend that abolition of the oilers' positions means extra work for the engineers, and that this is contrary to Article 15 of the Joint Agreement.[4] But this question also should be decided by the Adjustment Board before the district court undertakes to decide it at least when the answer is not perfectly clear.

Judge Bryan thought that the action of the railroads was not "in accordance with the theory or spirit of the Railway Labor Act." The factor that impelled him to preserve the *status quo ante* was undoubtedly his desire to avoid a tie-up of the appellants' marine operations by reason of the picket lines set up by the oilers and the refusal of other employees in related fields to cross the picket lines. However commendable the purpose of granting the mandatory injunction, we find nothing in the Act which authorizes it before the Adjustment Board has acted on the dispute. Accordingly it must be reversed.

Such reversal, however, does not mean that the court was powerless to enjoin the threatened strike. If the unions are to have the benefits of the Act they must also discharge its obligations. The granting of the preliminary injunction against any strike or work stoppage until the pro-

4 "ARTICLE 15—CLASSIFICATION AND RATE BASIS

Established positions shall not be discontinued or abolished and new ones created under different titles covering relatively the same class of work for the purpose of reducing rates of pay and evading the applications of the articles of this Agreement."

cedures provided by the Act had been exhausted was plainly correct. As pointed out in *Trainmen v. Chicago R & I. R. Co.*, 353 U. S. 30, 39-42, the Norris-LaGuardia Act presents no prohibition of the injunction under the facts appearing in the present case.

CLARK, *Chief Judge* (dissenting):

In granting the injunction under appeal, which ordered the appellant railroads to reinstate their discharged diesel tug oilers pending resolution of the instant labor dispute by the appropriate statutory agency, Judge Bryan was particularly careful and thorough in supporting his action on grounds stated in a lengthy and reasoned opinion. Therein he set forth his basic conclusions that the precipitous abolition of these jobs by the railroads with less than five days' effective notice to the unions involved was in violation of the Railway Labor Act, 45 U. S. C. § 151 *et seq.*, and that temporarily reinstating the oilers was the only sure way to avoid a serious disruption of vital transportation services in the Port of New York. The order of injunction, thus so fully supported, seems to me an eminently sound and proper exercise of judicial power committed to a district judge's discretion. I would affirm the decision below in its entirety, and not merely the part directed against the unions, as my brothers hold.

Far too much attention has been directed on this appeal to the question whether the arbitration or the mediation procedures of the Railway Labor Act govern the instant labor dispute.[1] Without question, federal district courts

1 The designations "minor grievance" (or "dispute") and "major dispute," occasionally used to characterize these respective procedures, though these terms do not appear in the statutes, are particularly inapt here. It cannot be gainsaid that the instant controversy is in many respects of major importance irrespective

are broadly empowered to issue injunctions and other appropriate orders to carry out the policies and purposes of this Act. *Brotherhood of R.R. Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U. S. 30, 41-42; *Virginia Ry. Co.* v. *System Federation No. 40, Railway Employees Department of American Federation of Labor*, 300 U. S. 515; *Railroad Yardmasters of America* v. *Pennsylvania R. Co.*, 3 Cir., 224 F. 2d 226; see also *Brotherhood of R.R. Trainmen* v. *Howard*, 343 U. S. 768; *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen*, 338 U. S. 232; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76*, 323 U. S. 210; *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192; *Cunningham* v. *Erie R. Co.*, 2 Cir., 266 F. 2d 411. And there is nothing in the statute or in the nature of Adjustment Board proceedings which demands that these powers be radically limited or changed whenever a labor dispute contains an issue cognizable by such a Board.

Nor do I find anything in the two cases particularly relied on by my brothers to require the overturning of these settled legal principles or to furnish definitive support for the unreal and unworkable reading of the Act here made; each rests primarily on its own particular facts governing the exercise of discretion by a court of equity and cannot properly be erected into a general proposition. In *Order of Ry. Conductors of America* v. *Pitney*, 326 U. S. 561, the Court actually reversed a dismissal of an injunction suit to reinstate it, but coupled

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of which statutory procedure is presently applicable to it; indeed, it is but a phase of the dispute as to dispensing with firemen on the dieselization of the railroads which has assumed major importance in this country and Canada. It would seem that these plaintiff railroads have jumped the gun on what may prove to be a nationwide crisis in a few months. See Barden, *Railroad Labor Crisis*, The Nation, Sept. 12, 1959, p. 128.

this reversal with a direction to the trial court to stay action until decision by an Adjustment Board, since it felt that a back pay award for interim wages lost would adequately compensate the employees and avoid irreparable injury. Justice Rutledge in dissenting thought that immediate action was necessary for the workers' protection. In *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Locomotive Engineers*, 5 Cir., 266 F. 2d 335, the court vacated an injunction reinstating discharged employees, expressing concern lest the grant of an injunction involve a prejudgment on the merits before action by an Adjustment Board. In that case, as in the *Pitney* case, immediate action was not required to avoid a major disruption of transportation, and they should be thus differentiated from the present case. And I can see nothing amounting to a prejudgment of the merits by Judge Bryan more than might perhaps be equally argued from a denial of an injunction.[2]

Judge Bryan was clearly correct in holding that the railroads' precipitous action violated their duties under the Railway Labor Act. Sec. 2 of the Act, 45 U. S. C. §152, applicable to all types of labor disputes, both "major" and "minor," provides:

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements

2 My brothers also cite *Norfolk & P. B. L. R. Co.* v. *Brotherhood of R. R. Trainmen, Lodge No. 514*, 4 Cir., 248 F. 2d 34, certiorari denied 355 U. S. 914, and *Stickman* v. *General Grievance Committee of the Brotherhood of Railroad Trainmen*, 2 Cir., 267 F. 2d 941, affirming *In re Hudson & Manhattan R. Co.*, D. C. S. D. N. Y., 172 F. Supp. 329—cases where the district court had granted an injunction enjoining a strike where after months of negotiation of a minor dispute the union had refused to follow the arbitration procedure. But these cases support that part of the judgment which I would join my brothers in affirming; they did not involve and do not consider the validity of an order requiring the employers to maintain the status quo during the proceeding.

concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

The instant controversy did not arise from one of the many situations where management may justifiably and in good faith take unilateral action without prior notice to or consultation with the representatives of its employees. Cf. *Order of Ry. Conductors of America* v. *Pitney, supra*, 326 U. S. 561. Such decisions are not effected with the elaborate legal preparations designed to bring off a *fait accompli* which preceded appellants' abolition of the position of oiler here. It is clear from the objective evidence in the record of appellants' careful planning—one appellant even made application for a temporary restraining order before it had received any communication from defendant unions in regard to the oilers it had discharged—that the management of the railroads well knew their action would evoke most forceful protests and make a work stoppage all but inevitable.

In comparable situations carriers have customarily given substantial advance notice of their intentions and fully negotiated the issues before taking definitive action.

See *In re Hudson & Manhattan R. Co.*, D. C. S. D. N. Y., 172 F. Supp. 329, affirmed on opinion below, *Stichman* v. *General Grievance Committee of the Brotherhood of Railroad Trainmen*, 2 Cir., 267 F. 2d 941; *Norfolk & P. B. L. R. Co.* v. *Brotherhood of R.R. Trainmen, Lodge No. 514*, 4 Cir., 248 F. 2d 34, certiorari denied 355 U. S. 914; *Brotherhood of R.R. Trainmen* v. *New York Cent. R. Co.*, 6 Cir., 246 F. 2d 114, certiorari denied 355 U. S. 877.[3] There is no reason why this could not have occurred here. Surely on the facts of this case the suggestion that no "dispute" existed and the railroads had no duty to negotiate or otherwise act in good faith until after the unions protested the discharges of the oilers is a strange and wonderful and wholly nullifying reading of the above quoted portions of the Railway Labor Act. These men have permanently lost their livelihood; it is an obvious solecism to require them to make some sort of formal protest before any dispute can become apparent to us.

Finally, the cold hard reality here is, as Judge Bryan found, that only if the oilers are reinstated can a work stoppage and transportation tie-up in the Port of New York be avoided with any certainty, since these displaced workers cannot be enjoined from individual picketing. This fact cannot properly be ignored or deemed irrelevant; it is at the core of the only matter which is the proper concern of this court or the court below. Our sole function here is to further the *public* interest in avoiding a disruption of inter-state commerce, not to safeguard the financial position of the railroads or to punish the respondent unions for calling a strike. Only to this limited extent has Con-

[3] Even in *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Locomotive Engineers*, 5 Cir., 266 F. 2d 335, the railroad gave more than two weeks' effective notice to the union.

gress superseded the general prohibition against federal court interference in railway labor disputes. *Virginian Ry. Co.* v. *System Federation No. 40, Railway Employees' Department of American Federation of Labor*, *supra*, 300 U. S. 515, 552; *Order of Ry. Conductors of America* v. *Pitney*, *supra*, 326 U. S. 561, 566. We should not reverse the sound decision of a conscientious district judge which clearly provides the best possible means of protecting this vital public interest.

APPENDIX C

DECISION BELOW DENYING PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 354—October Term, 1958.

(Petition filed October 16, 1959

Decided November 12, 1959.)

Docket No. 25757

THE BALTIMORE & OHIO RAILROAD COMPANY, *et al.*,

Plaintiffs-Appellants,

v.

UNITED RAILROAD WORKERS DIVISION OF TRANSPORT WORKERS UNION OF AMERICA, in its own right and as representative of the UNITED RAILROAD WORKERS OF AMERICA, CIO, LOCAL 1463, and its members, *et al.*,

Defendants-Appellees.

Before:

CLARK, Chief Judge,

and SWAN and MOORE, *Circuit Judges.*

On Petition for Rehearing.

PER CURIAM:

Petition denied.

CLARK, *Chief Judge* (dissenting):

The Supreme Court has now granted certiorari in the case here relied on as controlling precedent, *Missouri-*

Appendix C

Kansas-Texas R. Co. v. Brotherhood of Locomotive Engineers, 5 Cir., 266 F. 2d 335, and has accepted as the question for consideration one with direct implications for the issues here. It is thus stated: "Whether a district court under circumstances where a dispute arising under the Railway Labor Act has been submitted by a railroad to the National Railroad Adjustment Board and an injunction against a strike by employees is sought on authority of *Brotherhood of Railroad Trainmen v. Chicago River and Ind. R.R. Co.*, 353 U.S. 30, may on the granting of an injunction impose reasonable conditions designed to protect the employees against a harmful change in working conditions during pendency of the dispute before the Adjustment Board by ordering that the railroad restore the status quo, or, in the alternative, pay the employees the amount they would have been paid had changes in working conditions giving rise to the dispute not been made." 28 U.S.L. Week 3108. This action, it seems to me, points up the doubtful nature of our decision. Because of the uncertainty thus created and because of the irreparable loss to the employees which our decision will inevitably cause, I believe restudy of the problem is most desirable. I would grant the rehearing.

APPENDIX D

JUDGMENT BELOW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of October one thousand nine hundred and fifty nine.

Present: Hon. CHARLES E. CLARK, Chief Judge.
Hon. THOMAS W. SWAN,
Hon. LEONARD P. MOORE, Circuit Judges.

BALTIMORE & OHIO RR Co., BUSH TERMINAL RR Co., CENTRAL RR Co. OF N. J., DELAWARE, LACKAWANNA & WESTERN RR Co., ERIE RR Co., THE LEHIGH VALLEY RR Co., LONG ISLAND RR Co., NEW YORK CENTRAL RR Co., NEW YORK, NEW HAVEN & HARTFORD RR Co., and the PENNSYLVANIA RR Co.,

Plaintiffs-Appellants.

v.

UNITED RAILROAD WORKERS DIVISION OF THE TRANSPORT WORKERS UNION OF AMERICA, CIO, LOCAL 1463, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed as to the mandatory injunction and affirmed as to the preliminary injunction in accordance with the opinion of this Court; with costs to the appellants.

A. Daniel Fusaro,
Clerk.

Proof of Service

I, CARL E. NEWTON, counsel for certain of the petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 19th day of November 1959, I served copies of the foregoing petition for writ of certiorari on the Respondents, The Baltimore and Ohio Railroad Company, et al., by mailing copies in duly addressed envelopes, with first-class postage prepaid, to Respondents' attorneys of record as follows: to Edward F. Butler, E. Sherwood Alexander, and Manuel Schultz, Esqs., 39 Broadway, New York 6, New York; and to Joseph P. Allen, Esq., 55 West 42nd Street, New York 36, New York.

CARL E. NEWTON

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CARL E. NEWTON
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